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No. 80-2196

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTOINE MOWAD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, a conspiracy conviction may stand after one of the two objects of the conspiracy charged is found on appeal not to be unlawful.

2. Whether petitioner may be convicted of conspiracy to attempt to export firearms, where attempting to export firearms is specifically proscribed.

3. Whether the evidence was sufficient to sustain petitioner's conviction for attempting to export firearms without a license.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 641 F. 2d 1067.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1981. A petition for rehearing was denied on April 27, 1981 (Pet. App. 13a). The petition for a writ of certiorari was filed on June 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of dealing in firearms without a license, in violation of 18 U.S.C. 922(a)(1) and 18 U.S.C. 2 (Count One), attempting to export firearms without an export license, in violation of

22 U.S.C. 401 and 2778(c), 22 C.F.R. 123.01 and 127.03, and 18 U.S.C. 2 (Count Two), and of conspiracy to commit the two substantive offenses, in violation of 18 U.S.C. 371 (Count Three). He was sentenced to concurrent terms of two years' imprisonment on Counts One and Two, subsequently reduced to 18 months' imprisonment, to be followed by a consecutive term of five years' probation on Count Three. On appeal, the court of appeals affirmed petitioner's convictions on Counts Two and Three, but reversed petitioner's conviction on Count One, remanding with instructions to dismiss Count One and vacate the sentence imposed thereunder (Pet. App. 1a-12a).

1. The evidence at trial is set forth in the opinion of the court of appeals. Briefly, it shows that petitioner's convictions arose out of an investigation by the Bureau of Alcohol, Tobacco and Firearms (BATF) of individuals attempting to purchase a large number of firearms for export to Lebanon. Recordings were made of petitioner's conversations with the owner of one gun shop and an employee of another shop, both of whom were cooperating with the BATF, as well as with an undercover BATF agent posing as a pilot. In these conversations, petitioner, a federally registered exporter of firearms, and his companions expressed interest in periodically purchasing large quantities of firearms for shipment to Lebanon. In March 1979, after petitioner had apparently received assurances that previously existing obstacles posed by Lebanese customs had been eliminated, he and his associate placed an order for an assortment of 110 handguns, which they believed were stolen and for which they paid a total of $16,750 (Pet. App. 2a-4a).

On April 6, 1979, petitioner and his associates took delivery of the guns at a warehouse in New Haven and packed them into two large wooden crates. Federal agents arrested petitioner and his colleagues as they were removing the

crates from the warehouse (Pet. App. 3a). Circumstantial evidence demonstrated that petitioner intended to fly the shipment to Lebanon that very evening. After his arrest, petitioner denied any prior knowledge of the existence of the handguns. Although he had registered as an exporter of firearms, petitioner had never applied for an export license to ship firearms to Lebanon. Testimony of a State Department official revealed that because of the unsettled conditions prevailing, the Department's Office of Munitions Control was not issuing licenses to ship firearms to Lebanon, other than those destined for diplomatic personnel.[1]

2. On appeal, petitioner argued (1) that as a firearms exporter registered with the Department of State pursuant to 22 U.S.C. 2778(b), he was exempt from 18 U.S.C. 922, which prohibits firearms dealing by individuals not holding licenses from the Department of Treasury; (2) that the evidence, in any event, did not support his conviction on Count One; (3) that the evidence did not support his conviction on Count Two; (4) that if the conviction on Count One was reversed, the conspiracy conviction could not stand either; (5) that there was insufficient proof of a criminal agreement to sustain the conspiracy charge; (6) that the conspiracy charge, as applied to the substantive offense charged in Count Two (attempt to export firearms without a license) did not state a criminal offense; and (7) that certain comments by a member of the jury venire, during jury selection, which prompted her dismissal for cause and evoked a cautionary instruction to the entire jury panel, so prejudiced the panel as to have required a mistrial.

Relying primarily on legislative history, the court of appeals held (Pet. App. 4a-8a) that exportation of firearms by an exporter registered with the Department of State does

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[1]J.A. 500. "J.A." refers to the joint appendix filed in the court of appeals.

not constitute a violation of 18 U.S.C. 922(a), notwithstanding the exporter's failure to obtain a license from the Treasury Department as a firearms dealer.[2] Petitioner's challenge to the sufficiency of the evidence to support the conviction on Count Two was rejected (Pet. App. 8a-10a), the court finding that the evidence supported a finding of the requisite criminal intent and the existence of substantial steps toward consummation of the crime. Petitioner's contentions regarding the conspiracy count were likewise rejected. Reversal of petitioner's conviction on Count One did not require reversal of his Count Three conviction in the circumstances of this case, the court held, because it was clearly proven that petitioner and his colleagues conspired to commit the offense charged in Count Two (*id.* at 10a-11a). The court further held that Count Three, applying the general criminal conspiracy statute to the substantive offense of attempted unlawful exportation of firearms, charged a prosecutable offense (*id.* at 11a-12a). Finally, petitioner's claim of prejudice stemming from comments by an excused member of the jury venire was rejected as frivolous (*id.* at 12a).

ARGUMENT

1. Petitioner contends (Pet. 7-17) that his conviction on the conspiracy count (Count Three) cannot stand because the court of appeals concluded that one of the two substantive offenses charged as objectives of the conspiracy did not, as a matter of law, constitute a crime. In *Stromberg* v. *California*, 283 U.S. 359 (1931), this Court reversed a conviction on a single substantive count that, under the instructions to the jury, may have rested on any of three separate theories, one of which was deemed inconsistent with the Constitution. The reversal was bottomed on the impossibility of determining from the general verdict whether the

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[2]The court accordingly did not reach petitioner's other arguments concerning Count One. Pet. App. 8a n.12.

conviction had a permissible basis. This case, unlike *Stromberg*, involves a conspiracy conviction and presents no issue of a conviction resting on an unconstitutional theory. Recently, in *Chiarella* v. *United States*, 445 U.S. 222, 237 n.21 (1980), this Court, following *Stromberg*, stated that a criminal conviction may not be upheld if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct. The pertinent inquiry accordingly becomes whether the jury might have found a conspiracy only with respect to the invalidated substantive charge. On the facts of this case there is no such possibility, and petitioner's claim is accordingly without merit.

a. The two substantive counts of the indictment, which were listed as objectives of the conspiracy charged, concerned the same activities and the same firearms, differing only in the penal provision relied upon, the explicit reference to unlawful exportation in Count Two, and the related fact that Count One, unlike Count Two, charged a completed offense. The convictions on these two counts rested on the identical evidence. The first count was held to be deficient, not because the jury could not properly have concluded that petitioner had committed the acts charged,[3] but because the court of appeals concluded that Congress had not intended 18 U.S.C. 922(a) to proscribe firearms dealings by one registered as a firearms exporter, even where, as here, the transaction in question was shown to constitute an illegal export because no license authorizing the contemplated shipment had been obtained. Thus, the thrust of the court of appeals' ruling was simply that the charge applicable to petitioner's unlawful conduct was violation of 22 U.S.C. 401 and 2778(c), and 22 C.F.R. 123.01 and 127.03—in other words the charge embodied in Count Two (Pet. App. 6a-7a).

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[3]Indeed, petitioner acknowledges that he did so (Pet. 15-16).

Under the circumstances of this case there is no possibility that the jury could have concluded that petitioner conspired only to deal in firearms, but not to export them illegally. Petitioner's conviction on the substantive offense of attempted illegal exportation of firearms charged in Count Two reveals the jury's conclusion that he possessed the requisite criminal intent and committed overt acts sufficient to sustain the conspiracy conviction in those respects, and petitioner does not argue otherwise. Rather, petitioner argues only (Pet. 12-13, 16-17) that the conviction on Count Two does not necessarily establish a jury finding as to the agreement element of the conspiracy offense, as it applies to the offense charged in Count Two.

In light, however, of the relationship between Count One and Count Two explained above, the jury's finding of the necessary agreement is inescapably inferred from the conviction on Count Three in this case. First, while petitioner questions (Pet. 16-17) whether an agreement was formed at all, he cannot deny that the jury must have concluded that it was. Second, there was no possibility here that the jury could have concluded that petitioner's conspiratorial agreement extended only to domestic dealing in firearms, because the jury found that he intended to export the firearms illegally (see Pet. App. 10a). Indeed, petitioner acknowledges (Pet. 15, 26), as he has proclaimed throughout, that his intention, and that of his associates, was to export the firearms in question. Thus, while petitioner questions the adequacy of the proof of the attempted illegal export (see pages 11-12, *infra*), he cannot deny that the jury found that the criminal agreement included exportation without the required license. There is accordingly no merit to petitioner's contention (Pet. 15-16) that the conspiracy conviction rested only on a jury's finding that petitioner conspired to engage in domestic arms transactions.

The correctness of the decision below upholding the conspiracy conviction is especially clear in light of the district court's instructions to the jury. The court explained, with reference to the conspiracy count, that

> [t]he gist of the offense in this indictment is the combination or agreement to export to Lebanon the arms * * * which the Court has previously mentioned without a license or written approval from the Department of State.

Pet. App. 21a. This charge assuredly focused the jury's attention on the unity of the evidence regarding the formation and scope of the conspiracy as it applied to the two objectives charged.

b. Contrary to petitioner's contention (Pet. 7-9), the Court is not called upon to resolve an irreconcilable conflict among the courts of appeals in this case, for none of the decisions claimed to be inconsistent with the result in the instant case reverses a conviction upon a multiple objective conspiracy count where, as here, the relationship of the objectives was such that the jury's verdict as to a particular objective held to constitute an offense was manifest. Rather, in each of the cases cited, the reviewing court deemed itself unable to discern whether the jury had found the elements of a conspiracy to commit an unlawful act. In *United States* v. *Baranski*, 484 F. 2d 556, 560-561 (7th Cir. 1973), defendants were acquitted on *all* of the substantive counts, and the court of appeals overturned the conspiracy conviction upon finding that one of the three substantive offenses charged, and incorporated in the conspiracy count as an object, could not constitutionally be treated as a crime. Because the court agreed that "on the basis of the evidence" the jury might have found no conspiracy to commit the remaining offenses, and that it was impossible to

discern the jury's actual verdict, the conspiracy conviction was reversed.[4]

Nor is the Ninth Circuit's narrow decision in *United States* v. *Carman*, 577 F. 2d 556 (1978), irreconcilable with the decision below. Although the *Carman* court overturned a conspiracy conviction when it concluded that one of the underlying substantive counts did not charge a federal offense, the court acknowledged that where it could be determined that the jury "focused on other crimes" charged as well as the substantive count held defective "the conspiracy conviction should be sustained." *Id.* at 567-568. For the reasons stated above this is just such a case. The result in *United States* v. *Dansker*, 537 F. 2d 40 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977), likewise does not conflict with the decision below. In *Dansker*, the defendants were convicted on all counts of a three count indictment alleging conspiracy to commit bribery of two individuals, and bribery of each, in separate counts. The court of appeals vacated one of the two bribery counts concluding that what was offered was not, in law, a bribe. 537 F. 2d at 50-51. The conspiracy count was vacated as well because of the possibility that the jury had found a conspiracy to commit only the acts held lawful, the court noting the possibility that the defendants acted without a common plan in executing the

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[4]In *Van Liew* v. *United States*, 321 F. 2d 664, 672 (5th Cir. 1963) (emphasis in original), the court reversed a conspiracy conviction after concluding that the indictment was defective with respect to one of the two kinds of underlying substantive offenses charged, remarking that "[t]he guilty verdict was general. With inquiry forever foreclosed, it is just as likely that the verdict was based on the *insufficient* charge * * * as on * * * [the remaining objective offense]." But in *Van Liew* there was apparently no identity between the acts charged under the two substantive offenses incorporated in the conspiracy charge; each related to a separate incident. *Id.* at 667 n.2. Moreover, the *Van Liew* court ultimately held the remaining substantive counts defective (*id.* at 673-674), and the reasoning cited above was accordingly not essential to the result.

bribe that was the subject of the valid substantive count. *Id.* at 51. No such possibility exists in this case, because the criminal conduct underlying Count One, and the criminal agreement that is an element of the conspiracy count, insofar as it rests on Count One, are wholly subsumed in the other branch of the conspiracy count. *United States* v. *Tarnopol,* 561 F. 2d 466, 473-475 (3d Cir. 1977), is also distinguishable because the three objects of the conspiracy there charged were disparate rather than overlapping and there was accordingly uncertainty on appeal as to whether all of the elements of a conspiracy to commit an act held to be a crime had been found.

2. Petitioner challenges (Pet. 16-22) his conviction for "conspiracy to attempt to export" firearms on the ground that a "conspiracy to attempt" a substantive offense does not constitute a crime. The court of appeals properly rejected this claim (Pet. App. 11a-12a). As the court observed, *attempting* to export firearms without a license is specifically prohibited[5]; accordingly, a charge of conspiracy to attempt, based on the general conspiracy offense created by 18 U.S.C. 371 and the applicable, specific prohibition, is permissible. Even assuming that "conspiracy to export" would have been the preferable charge, however, petitioner suffered no prejudice from the inartful drafting. The indictment, given a common-sense construction, clearly put petitioner on notice of the charge against him; it protects him from a subsequent prosecution for the same offense;

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[5]22 C.F.R. 127.01, promulgated under the authority of 22 U.S.C. 2778(c), provides:

> (a) It is unlawful to export or attempt to export from the United States any article * * * for which a license or approval is required * * * without first obtaining the required license or written approval from the Department of State.

22 C.F.R. 123.01 and 127.03, cited in the indictment, respectively impose the export license requirement, and apply the criminal sanction of 22 U.S.C. 2778(c) to violations, *inter alia*, of 22 C.F.R. 127.01.

and it insures that he was prosecuted for the charges considered by the grand jury when it handed down the indictment. See *Hamling* v. *United States*, 418 U.S. 87, 117 (1974); *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962).[6]

Petitioner's suggestion (Pet. 18) that this case presents an inter-circuit conflict regarding "conspiracy to attempt" charges, is unpersuasive. Rather the court of appeals, in a discussion (Pet. App. 11a-12a & nn.14, 15) upon which we rely, properly harmonized *United States* v. *Clay*, 495 F. 2d 700 (7th Cir.), cert. denied, 419 U.S. 937 (1974), and *United States* v. *Meacham*, 626 F. 2d 503 (5th Cir. 1980), the cases cited by petitioner, distinguishing *Meacham*, and relying upon *Clay*. The *Meacham* court also distinguished *Clay*,

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[6]The indictment charged an incomplete offense, the object of which was the crime of exporting firearms without the required license. Petitioner's suggestion (Pet. 21) that he was charged with conspiracy to fail in the commission of a crime is frivolous, for failure is not an element of an "attempt" offense in any sense relevant here—it merely serves to distinguish the inchoate crime from the complete offense. In any event, the district court's jury instructions on the conspiracy count (Pet. App. 21a-28a) make it plain that the offense charged was not the absurdity suggested by petitioner. These were ordinary conspiracy instructions, applied to the two underlying offenses. The district court did not refuse to instruct the jury on this offense, as petitioner claims (Pet. 19), but evidently declined to adopt the peculiar and unsound construction advanced by petitioner. And nothing in the instructions permitted the jury to convict based upon a showing of criminal conduct insufficiently complete to "justify the intervention of the criminal law." *United States* v. *Feola*, 420 U.S. 671, 694 (1975). Rather, under the instructions given, the evidence clearly supported and the jury surely found a conspiracy to commit the completed offense of exporting without a license. Whether or not a conspiracy to attempt a crime is always tantamount to conspiracy to commit the crime, as appears logically to be the case, there can be little doubt of the soundness of the conviction in this case.

Petitioner's suggestion (Pet. 17-18) that Congress did not intend to create the conspiracy offense at issue is simply inconsistent with the adoption of Section 371's general prohibition on conspiracies "to commit any offense against the United States."

finding it unnecessary to "reach the more elusive question at issue in *Clay*." 626 F. 2d at 509. There is accordingly no warrant for further review.

3. Petitioner's final contention (Pet. 22-29) is that, in order to convict him of attempted unlawful export of firearms, the government was obliged to show exactly "where, when and how the substantive offense would occur" (*id.* at 22). Petitioner cites no authority that directly supports this remarkable proposition, and we are aware of none. So long as the elements of an offense are proven with reasonable definiteness, additional details about the methods used to violate the law can have at most corroborative evidentiary significance. Petitioner seeks (Pet. 26-28) to tie the restrictive rule advanced to the requirement that, in addition to mere intent to commit a crime, a "substantial step" toward consummation of the crime must be shown in order to obtain a conviction for attempt. See, *e.g.*, *United States* v. *Mandujano*, 499 F. 2d 370, 373-377 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975). However, the court of appeals applied (Pet. App. 8a-10a) the very analysis commended by petitioner, concluding (*id.* at 10a; citation omitted) that the evidence demonstrated that petitioner's conduct had "progressed sufficiently to minimize the risk of an unfair conviction." And assuming that, as the jury concluded, petitioner planned to export the firearms he bought illegally, the acquisition of the firearms is surely a substantial step toward that goal.[7] Petitioner's contention is accordingly reduced to a challenge to the sufficiency of the evidence—a challenge rejected by the district court (see Pet. App. 4a) and the court of appeals (*id.* at 9a-10a). No reason has been

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[7]Petitioner's reliance (Pet. 26-28) on § 5.01(2)(f) of the Mode l Penal Code (Prop. Official Draft, 1962) is misplaced, for that provision merely sets forth one of seven sets of circumstances which, the Code states, "shall not be held insufficient as a matter of law," the listing of which does not "negativ[e] the sufficiency of other conduct."

demonstrated for a departure from this Court's practice of declining to reconsider such factual matters.

In any event, the court of appeals correctly determined that the evidence at trial supported petitioner's conviction on Count Two (see Pet. App. 2a-4a, 9a-10a). The evidence clearly pointed to petitioner's intent to ship large quantities of firearms to Lebanon without going through proper and legal channels. Indeed, throughout the period of negotiations on the purchase of the guns for exportation to Lebanon, petitioner never applied for the necessary export license. J.A. 503, 2684. Moreover, the evidence showed that petitioner believed that the 110 weapons, which he bought to send to Lebanon, were stolen firearms. Finally, after his arrest petitioner falsely disclaimed any prior knowledge of the handguns. Based on this evidence, the jury reasonably rejected petitioner's defense that he intended to transport the crates containing the firearms to his home, where he would store them while he applied for the license.[8]

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[8]The evidence actually covered the particulars petitioner claims had to be proven, reflecting that petitioner planned to send the guns to New York City for immediate export to Lebanon. The time was established in a conversation between petitioner and a firearms dealer cooperating with the government, in which petitioner stated that the arranged pickup time for the guns would "leave us more than six, seven hours" (Pet. App. 9a-10a). The means to be used could be inferred from petitioner's conversations concerning transportation of weapons to Lebanon by air and was corroborated by his concurrence in a dealer's reference to petitioner's intention to "fly them the hell out of here" (*id.* at 10a n.13). Petitioner's inquiry to a BATF agent posing as a guard at the warehouse where the guns were delivered as to the best route to New York City suggested that the guns would be flown out of that city (*id.* at 10a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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